UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRESH & EASY NEIGHBORHOOD MARKET, INC.

and **Case 21-CA-39649**

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

ORDER

The Respondent's Motion for Special Permission to Appeal Administrative Law Judge John J. McCarrick's ruling denying the Respondent's motion to close the record is granted, but the appeal is denied on the merits. We find that the Respondent has failed to establish that the judge abused his discretion in denying the Respondent's motion.

On March 31, 2011, the Regional Director for Region 21 issued a complaint alleging that the Respondent violated Section 8(a)(1) by posting no-solicitation signs at five of its stores. Before the hearing, the Charging Party served a subpoena duces tecum dated June 17, 2011, on the Respondent but did not serve a copy on the Respondent's counsel of record. The Respondent did not file a petition to revoke the subpoena, and it did not produce the requested documents.

At the hearing, which opened on July 19, 2011, three witnesses testified and the Acting General Counsel rested his case. The parties then addressed the issue of the Charging Party's subpoena, and the judge agreed to hold the record open to allow time for the Charging Party's counsel to decide whether to request subpoena enforcement. On July 25, the Charging Party's counsel requested subpoena enforcement. On August

8, the Respondent filed a motion to close the record, asserting that the Acting General Counsel has rested his case and has not sought to amend the complaint or otherwise indicated a need for further proceedings on the merits. Subsequently, the Charging Party filed an opposition to this motion, the judge issued an order to show cause why the motion should not be granted, and the parties filed responses. On August 16, 2011, the judge denied the Respondent's motion to close the record, relying in part on the Respondent's failure to timely file a petition to revoke the subpoena.

On August 24, 2011, the Respondent filed a Motion for Special Permission to Appeal from the Ruling of the Administrative Law Judge. On September 1, 2011, the Acting General Counsel filed a response stating that he takes no position on the Respondent's appeal, and on September 7, 2011, the Charging Party filed a statement in opposition to the Respondent's appeal.

In its appeal, as in its motion to close the record, the Respondent argues that the subpoena is invalid because it was not served on the Respondent's counsel, as required by the Board's Rules and Regulations, and therefore, the Respondent is under no obligation to respond to the subpoena. In addition, the Respondent asserts that subpoena enforcement proceedings are improper because the Acting General Counsel has rested his case without joining in any further theory advanced by the Charging Party, and the Acting General Counsel's theory of the case is controlling.

In its opposition, the Charging Party argues, among other things, that the subpoena was properly served on the Respondent, and the Board's Rules do not invalidate a subpoena because it is not served on a party's representative. The Charging Party emphasizes that the Respondent failed to file a petition to revoke the

subpoena despite having received the subpoena. As noted above, the Acting General Counsel filed a brief response to the Respondent's appeal, stating that he takes no position on the Respondent's motion. The Acting General Counsel notes his intention, in the event that the appeal is denied, to immediately take action on behalf of the Charging Party to enforce the subpoena. In the event that the appeal is granted, the Acting General Counsel states that he "will take whatever action is necessary to carry out the Board's instruction."

Having duly considered the matter, we grant the request for special permission to appeal the administrative law judge's ruling, and we deny the appeal on the merits. We find that the judge did not abuse his discretion in denying the Respondent's motion to close the record. The Respondent has failed to establish or even allege that it suffered any prejudice from the Charging Party's failure to serve the subpoena on the Respondent's counsel. The courts have found that such failure to serve counsel does not constitute grounds for revoking a subpoena, absent a showing of prejudice. See *NLRB v. Cincinnati Bronze, Inc.*, 811 F.2d 607 (6th Cir. 1987) (Table); *NLRB v. Playskool, Inc.*, 431 F.2d 518, 520 (7th Cir. 1970).

In addition, contrary to the Respondent's contention, the Acting General Counsel's right to control the theory of the case does not preclude the Charging Party from introducing evidence at the hearing once it receives documents in response to its subpoena. Section 102.38 of the Board's Rules provides that "[a]ny party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent

permitted by the administrative law judge…." As the Board stated in *Spector Freight System, Inc.*, 141 NLRB 1110, 1111 (1963), the extent of a charging party's participation in the presentation of evidence under this rule is committed to the judge's sound discretion, "reviewable only for abuse of discretion." Accordingly, there is nothing inappropriate about the pursuit of subpoena enforcement proceedings under these circumstances.

Finally, we note that the Respondent has never filed or sought to file with the Board a petition to revoke the subpoena, which would have been the appropriate vehicle for raising any issues regarding its validity. In the absence of a petition to revoke the subpoena, we decline to pass on the Respondent's further arguments regarding the validity of the subpoena, and we find that the judge did not abuse his discretion by holding the record open pending the conclusion of subpoena enforcement proceedings.[1]

Dated, Washington, D.C., November 16, 2011.

MARK GASTON PEARCE,	CHAIRMAN
CRAIG BECKER,	MEMBER
BRIAN E. HAYES,	MEMBER

[1] In Member Hayes' opinion, it would have been preferable for the judge to close the record absent a specific offer of proof by the Charging Party as to the need for the subpoenaed information in support of the General Counsel's theory of violation. This would have avoided what has now become a three-month delay in the trial process. However, Member Hayes agrees that in the circumstances of this case the judge did not abuse his discretion when denying the Respondent's motion to close.